U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAURA D. FULLER, executrix of the estate of JUDSON H. FULLER and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Martinsburg, WVA

Docket No. 02-625; Submitted on the Record;
Issued January 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended the employee's eligibility for compensation because he refused to attend a medical examination.

On May 20, 1999 the employee, then a 70-year-old medical planner, filed a claim for injuries sustained on May 14, 1999 in a motor vehicle accident.[1] He stopped work on January 24, 2000. The Office accepted the claim for costochondritis.

On July 3, 2000 the Office referred the employee to Dr. Harry VonErtfelda, a Board-certified orthopedic surgeon, for a second opinion examination. In a report received by the Office on August 4, 2000, Dr. VonErtfelda diagnosed preexisting degenerative disc disease of the cervical spine, status post anterior fusion at C5-6 and status post repair of the rotator cuff of the right shoulder. He opined that the employee could not perform his regular employment due to residual problems resulting from his May 14, 1999 motor vehicle accident. In an accompanying work restriction evaluation, Dr. VonErtfelda opined that the employee could work limited duty four to six hours per day with restrictions.

In a letter dated September 27, 2000, the employing establishment offered the employee a district manager position for six hours per day in accordance with Dr. VonErtfelda's restrictions.

By letter dated September 28, 2000, the Office informed the employee that the position was suitable and provided him 30 days within which to accept the position or provide reasons for refusing the position.

The employee submitted a report dated October 17, 2000 from Dr. John A. Hamjian, a Board-certified neurologist, who diagnosed polyneuropathy and recommended that the employee

[1] The employee died on January 2, 2002 in a motor vehicle accident.

not perform a position which required more than local travel or climbing stairs. The employee also submitted a report dated October 24, 2000 from Dr. S. Gay Freeman, Board-certified in family practice, who indicated that the employee underwent neck surgery in December 1999 and shoulder surgery in March 2000. Dr. Freeman opined that the employee's neck and shoulder conditions may have been aggravated by the motor vehicle accident. She further diagnosed peripheral neuropathy unrelated to his motor vehicle accident. Dr. Freeman opined that the employee could not perform the offered job because he could not sit more than one hour, lift or walk over 500 feet.

On October 25, 2000 the employee accepted the position "as amended." In a letter dated October 26, 2000, the employee's attorney informed the Office that the employee may not be able to work six hours every day. He further argued that Dr. VonErtfelda opined that the employee could not drive more than four hours per day but the employee's daily commute was 110 miles each way.

By letter dated November 2, 2000, the Office referred the employee to Dr. Brian Mercer, a Board-certified neurologist, to resolve a conflict in medical opinion. The Office scheduled the appointment for November 22, 2000.

In a letter dated November 3, 2000, the employee's attorney argued that the Office had not informed the employee of the nature of the conflict. He further objected to Dr. Mercer on the grounds that he performed second opinion examinations for the Office and because the location of his office was 100 miles from the employee's home.

In a November 6, 2000 response, the Office informed the employee's attorney that the conflict was over whether the position offered the employee was suitable. The Office found that the attorney had not submitted sufficient reasons to show that Dr. Mercer was improperly selected as an impartial medical specialist. The Office reiterated the need for the employee to attend the November 22, 2000 examination or risk suspension of compensation.

By letter dated November 21, 2000, the employee's attorney argued that the record did not contain a conflict in medical opinion because all of the employee's physicians opined that he could not perform the position offered by the employing establishment. He also noted that the employee had accepted the position.

In a November 22, 2000 response, the Office related that a conflict arose when there was a disagreement between the employee's attending physician and an Office referral physician. The Office further informed the employee's attorney that the fact that the employee had accepted the job was not relevant and that he was expected keep his appointment.

The employee did not keep his appointment scheduled with Dr. Mercer on November 22, 2000.

On December 8, 2000 the Office issued a notice of proposed suspension of compensation based on the employee's failure to appear for the impartial medical examination with Dr. Mercer. The Office advised the employee that he had 14 days to provide reasons for refusing to attend the scheduled examination.

In a letter dated December 22, 2000, the employee's attorney argued that the Office's referral of the employee to Dr. Mercer was improper because the employee was not informed of the specific nature of the conflict and the employee's physicians did not receive a copy of the second opinion examination. The employee's attorney further argued that Dr. Mercer was not qualified as an impartial medical specialist because he had conducted prior examinations for the Office and was not selected by the rotational system.

By decision dated February 21, 2001, the Office suspended the employee's right to compensation based on his failure to submit to the medical examination scheduled with Dr. Mercer on November 22, 2000. The Office found that the employee had not shown good cause for his failure to attend the appointment. The Office noted that the employee had actual notice of the reason for the impartial medical examination as demonstrated by the content of his attorney's letters. The Office also indicated that Dr. Mercer was selected in accordance with Office procedures and regulations. The Office further found that providing the employee's attending physicians with a copy of the second opinion examination was irrelevant in light of their opinions that he could not perform the offered position.

By letter dated February 22, 2001, the employee requested a hearing before an Office hearing representative, which was held on August 29, 2001.

In a letter dated August 28, 2001, the employee's attorney argued that the record did not contain a conflict in medical opinion and that the employee's acceptance of the job offer rendered the conflict moot.

By letter dated October 24, 2001, the employing establishment informed the Office that the employee had provided a "technical acceptance with substantive declination of the offered position." The employing establishment noted that the employee was removed from employment on June 25, 2001 but that his removal was subsequently rescinded in order for him to retire.

In a letter dated November 29, 2001, the employee's attorney contested the employing establishment's characterization of the employee's acceptance of the position.

By decision dated December 20, 2001, the hearing representative affirmed the Office's February 21, 2001 decision suspending the employee's compensation for failure to attend a scheduled medical examination.

The Board finds that the Office properly suspended the employee's eligibility for compensation because he refused to attend a medical examination.

Section 8123(a) of the Federal Employees' Compensation Act[2] provides:

> "An employee shall submit to examination by a medical officer of the United States or by a physician designated or approved by the Secretary of Labor, after

[2] 5 U.S.C. § 8103 *et seq.*

the injury and as frequently and at the times and places as may be reasonably required."[3]

Section 8123(d) provides:

"If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."[4]

In this case, the Office properly determined that a conflict in medical opinion existed between the opinion of the employee's attending physician, Dr. Freeman, and the Office referral physician, Dr. VonErtfelda, on the issue of his physical capability to perform the position offered by the employing establishment. Dr. VonErtfelda found the employee able to work limited duty for six hours a day subject to specified physical restrictions. Dr. Freeman, however, opined that the employee was not able to work limited duty and was disabled due to residuals of the accepted injury. Accordingly, the Office referred the employee to a Board-certified neurologist to resolve the conflict in medical opinion.

By letter dated November 2, 2000, the Office instructed the employee to attend a medical appointment with Dr. Mercer on November 22, 2000 at 9:00 a.m. The employee did not attend the scheduled appointment.

The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before the Office can suspend or deny the employee's entitlement to compensation on the grounds that the employee failed to submit to or obstructed a medical examination.[5] In this case, the time for the impartial medical examination by Dr. Mercer was set, the employee was duly advised of the scheduled appointment and failed to appear for the medical examination. The only remaining issue is whether the employee presented an acceptable excuse or reason for his failure to appear.

The Office's Federal (FECA) Procedure Manual provides:

"*Failure to Appear*. If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date on which the claimant agrees to attend the examination."[6]

[3] 5 U.S.C. § 8123(a).

[4] 5 U.S.C. § 8123(d).

[5] *Herbert L. Dazey*, 41 ECAB 271 (1989).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.810.14(d) (November 1998).

Following notice that the employee failed to appear for the examination scheduled with Dr. Mercer, the Office provided him 14 days to provide good cause for his failure to attend the appointment. In response, the employee's attorney objected to the Office's finding of a conflict in medical opinion and referral of the employee to Dr. Mercer.

The Board has examined the employee's reasons for not attending the impartial medical examination with Dr. Mercer on November 22, 2000 and finds that the Office properly determined that these reasons were unacceptable. The employee's attorney argued that there was not a conflict in medical opinion at the time of the Office's referral because the employee had accepted the job offer. Regardless of the employee's acceptance of the position, the record contained a conflict in medical opinion on the issue of whether the employee could perform the limited-duty position offered by the employing establishment on September 27, 2000 and on the employee's work capacity. Further, the employee only conditionally accepted the job offer based on a proposed increase in work restrictions. The employee's attorney also contended that the nature of the conflict was unclear; however, the record clearly demonstrates a conflict of medical opinion between the employee's physicians and the Office referral physician on the issue of his physical capability to perform the position offered by the employing establishment.

The employee's attorney also contends that the Office improperly referred the employee to Dr. Mercer, arguing that the physician was not qualified to serve as an impartial medical specialist as he regularly performed second opinion evaluations for the Office. The Board finds that these contentions are not supported by the evidence of record.

The Office's procedure manual provides for the selection of referee physicians under a rotational system using appropriate medical directories from physicians in the geographic area who agree to perform examinations for the Office.[7] The procedure manual precludes physicians in certain roles from acting as impartial medical specialists. These include physicians employed or under contract or regularly associated with a federal agency, physicians previously connected with the claim or claimant, and physicians who act as medical consultants to the Office.[8] A claimant who objects to the selection of a physician as a medical referee has the burden to document bias or unprofessional conduct on the part of the selected physician.[9] Under Office procedures, there is no preclusion from selecting a physician who performs second opinion examinations as an impartial medical specialist. Specialists are selected in alphabetical order as listed in the roster of physicians who agree to perform examination for the Office, taking into consideration the specialty and/or subspecialty heading in the appropriate geographic region. The fact that Dr. Mercer previously performed examinations for the Office does not render him ineligible to serve as the impartial medical specialist. No evidence of bias or unprofessional conduct on the part of Dr. Mercer was submitted. Moreover, the Office noted that it had followed its established procedures in the selection of Dr. Mercer as the impartial medical specialist and in referring the employee for examination. For this reason, the Board finds that the employee's failure to keep the November 22, 2000 appointment with Dr. Mercer constituted a

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (October 1995).

[8] *Id*. at 3.500.4(b)(3).

[9] *Id*. at 3.500.4(b)(4).

refusal to submit to a medical examination without good cause. The Office properly invoked the penalty provision of section 8123(d) of the Act in suspending his eligibility for compensation.

The decision of the Office of Workers' Compensation Programs dated February 21, 2001 is affirmed.

Dated, Washington, DC
January 28, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member